DATE: May 9, 1995

CASE NO.: 94-INA-00033

In the Matter of:

METRO PHARMACY, INC.,
Employer

On Behalf of:

MIRNA ELIZABETH ASCENCIO,
Alien

Appearance: Arnulfo Chapa, Esq.
For the Employer

Before: Huddleston, Litt, and Wood
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On July 15, 1992, Metro Pharmacy, Incorporated ("Employer") filed an application for labor certification to enable Mirna Elizabeth Ascencio ("Alien") to fill the position of Pharmacy Technician (AF 61). The job duties for the position are:

> Mixes and dispenses prescribed medicines and pharmaceutical preparations in absence of or under supervision of pharmacist: compounds preparations according to prescriptions issued by medical, dental, or veterinary officers. Pours, weighs, or measures dosages and grinds, heats, filters, or dissolves and mixes liquid or soluble drugs and chemicals. Procures, stores, and issues pharmaceutical materials and supplies. Maintains files and records and submits required pharmacy reports.

The requirements for the position are a five-year college degree in pharmacy and two years of experience in the job offered. Other special requirements are "Punctual/ Good Personal Hygiene/ Non-Smoker/ Verifiable references/ Speak English and Spanish/ Able to operate independently/ Punctual/ Knowledge of foreign medication and preparation."

The CO issued a Notice of Findings on June 23, 1993 (AF 16), proposing to deny certification on the grounds that the Employer has imposed unduly restrictive job requirements in violation of 20 C.F.R. § 656.21(b)(2), by imposing education requirements that far exceed those in the *Dictionary of Occupational Titles* (DOT), by imposing a foreign language requirement, and by imposing a requirement of knowledge of foreign medication and preparation. The CO also proposed to deny certification on the additional grounds that the Alien did not have the required two years of experience in the job offered, in violation of 20 C.F.R. § 656.21(b)(5).

Accordingly, the Employer was notified that it had until July 28, 1993, to rebut the findings or to cure the defects noted.

In its rebuttal, dated July 20, 1993 (AF 11), the Employer contended that it had shown a business necessity for the educational requirements in previous letters, one dated October 28, 1992 (AF 35), and one undated letter sent on or about March 17, 1993 (AF 37). In those brief, one paragraph letters, the Employer stated that the high educational requisites are necessary to

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

avoid negligence liability (AF 35), and to assist the large numbers of Spanish speaking customers who have "questions about medications from Latin America that are not sold in the U.S.A." (AF 37). The Employer further contended that the Spanish language requirement is necessary to serve the customers of the pharmacy, 80% of which are Spanish-speaking and have little or no knowledge of English, and that "approximately 95% of Metro Pharmacy's total business" is dependent upon the use of Spanish (AF 13-14). The Employer offered no specific response to the issue of actual minimum requirements.

The CO issued the Final Determination on September 8,1993 (AF 7), denying certification because the Employer had not adequately documented the business necessity of the educational and experience requirements, the Spanish language requirements, or the requirement of knowledge of foreign medication and preparation in violation of § 656.21(b)(2), and failing to adequately document that the required two years of experience in the job offered is an actual minimum requirement of the position in violation of § 656.21(b)(5).

On October 13, 1993, the Employer requested review of the Denial of Labor Certification (AF 2). On October 29, 1993, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruiting process. Unduly restrictive requirements are prohibited because they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). A job opportunity is without unduly restrictive requirements where the requirements for the position do not exceed those defined for the job in the *DOT* and are normally required for a job in the U.S. *Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989) (*en banc*); *Duarte Gallery, Inc.*, 88-INA-92 (Oct. 11, 1989). Section 656.21(b)(5) requires that the employer document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the position, and that the employer has not hired workers with less training or experience for similar jobs or that it is not feasible to hire workers with less training or experience than that required in the employer's job offer. Labor certification is properly denied where the alien does not possess all of the job requirements, thus evidencing that the job was not listed at its actual minimum requirements. *Valley Beth-Shalom School*, 91-INA-382 (Dec. 28, 1992).

One of the unduly restrictive requirement violations listed by the CO was the requirement of five years of college in pharmacy and two years of experience in the job offered, that of a Pharmacy Technician. The CO concluded that this requirement constitutes an unduly restrictive requirement because it is not included as a normal requirement for the position in the *DOT*, which requires one to three months of combined education, training, and experience for a Pharmacy Technician (AF 8). The CO notified the Employer that this finding could be rebutted by establishing that the job requirement: (1) bears a reasonable relationship to the occupation in the context of the Employer's business; and, (2) is essential to perform the job in a reasonable manner. See *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*); § 656.21(b)(2)(i). The Employer was advised that the evidence or documentation rebutting this finding must consist of

independent data to support its assertion and that unsubstantiated statements would not be accepted as evidence or documentation. The CO also gave the Employer the option of reducing the requirements to the *DOT* standard, amending the application, and readvertising.

In the Employer's rebuttal to the CO's Notice of this deficiency, the Employer argued that it had shown the business necessity of this requirement by two letters previously submitted. These brief, one paragraph letters merely assert that the Employer's educational requisites are based on the legal standard of care that is used to evaluate negligence liability, and that such high standards will reduce the possibility that Metro Pharmacy will ever have to defend itself in a legal action. The Employer further stated that the two years of experience is necessary to compliment the pharmacist degree and the Spanish requirement because they would provide the Alien with knowledge to assist the large numbers of Spanish-speaking customers who have "questions about medications from Latin America that are not sold in the U.S.A."

The CO is correct when he states in his Final Determination that these letters are not evidence of a business necessity. These letters are not independent documentation as requested, but are merely unsupported assertions and conclusions by the Employer. Although a written assertion constitutes documentation that must be considered, a bare assertion without supporting evidence is insufficient to carry the Employer's burden of proving a business necessity. See *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*). Unsupported conclusions are insufficient to demonstrate that certain job requirements are normal for a position, or are supported by a business necessity. *Inter-World Immigration Service*, 88-INA-490 (Sept. 1, 1989); *Tri-P's Corp.*, 88-INA-686 (Feb. 17, 1989).

The CO also found that the Spanish language requirement was unduly restrictive for the position, and informed the Employer that it could rebut the finding by showing a business necessity, or delete the requirement, amend the application, and readvertise. The Employer's rebuttal asserts that most of his business is derived from the Spanish-speaking population and the position requires Spanish language skills to communicate with the customers and answer questions in connection with a variety of foreign medications. Here, again, the Employer provides no independent documentation, and merely makes unsupported assertions that his customer base is predominantly Spanish-speaking, or that Spanish language skills are routinely required to deal with foreign medications. See *Gencorp, supra*; *Inter-World Immigration supra*. Moreover, the CO correctly points out in his Final Determination, that answering customers' questions regarding a number of foreign medications would be the job of a Pharmacist and not that of a Pharmacy Technician.

Thirdly, the CO found that the Employer's requirements of "mixing and dispensing" pharmaceutical preparations "in the absence of a Pharmacist," would be a duty of the Pharmacist, and an unduly restrictive requirement on the position of Pharmacy Technician. The CO gave notice to the Employer that it could provide justification for the appropriateness of these duties in the position, provide documentation to support the business necessity of this requirement, or delete the requirement, amend the application, and readvertise. In rebuttal, the Employer did not specifically address this issue, but reiterated its conclusion that "[t]he position requires a qualified individual who can translate our client's questions in connection with medication, terminology, and assist the Pharmacist in finding out information on foreign drugs and preparations found in

Spanish-written reference books" (AF 13). Here, the Employer's rebuttal is not responsive to the issue raised by the CO, as it provides no documentation or reasoning why it would appropriate for the Pharmacy Technician to perform the duties in question. Denial of certification has been affirmed where the employer has addressed only part of the deficiency in the NOF, *Tara of California*, 88-INA-478 (June 6, 1989), and where the employer has made only generalized assertions, *Winner Team Construction, Inc.*, 89-INA-172 (Feb. 1, 1990).

Finally, the CO found that the Employer had violated 20 C.F.R. § 656.21(b)(5) by failing to adequately document that two years of experience in the job offered is a minimum requirement. The CO gave Notice to the Employer that it must document that the requirements are the minimum necessary and that the Employer has neither hired, nor finds it feasible to hire workers with less training and experience. The CO further notified the Employer that it could rebut the finding by submitting evidence that the Alien had the qualifications required at the time of hire, or delete the requirements, amend the application, and readvertise. The Employer's rebuttal is silent as to this issue, and no documentation has been provided showing that the Alien had two years of experience in the position prior to being hired. In fact, the evidence of record shows that the Alien had no prior experience of any kind prior to being hired by the Employer as a cashier in 1991 (AF 64). A CO's finding that is not addressed in rebuttal is deemed admitted. § 656.25(e); *Belha Corp.*, 88-INA-24 (May 5,1989) (*en banc*). Failure to address a deficiency noted in the NOF supports a denial of labor certification. *Reliable Mortgage Consultants*, 92-INA-321 (Aug. 4, 1993); *Korean Manpower Development Inc.*, 93-INA-121 (Mar. 21, 1994).

Any one of these four separate violations would be sufficient to deny labor certification. As we have determined that there has been three violations of § 656.21(b)(2), and one violation of § 656.21(b)(5), it is abundantly clear that the CO's denial of certification was proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of August, 2002, for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary

to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.